LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 29 1969
JOHN F. DAVIS, CLERK

No. [redacted] 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

THOMAS J. DONOHUE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Walter E. Gillcrist
1317 F Street, N.W.
Washington, D.C. 20004
Counsel for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Amendments Involved	3
Statement	4
Reasons for Granting the Writ	8
Conclusion	12
Appendix A. Opinion Below	1a
B. Amendment to Opinion	10a
C. Judgment	12a
D. Statute Involved	13a

CITATIONS

Cases:

Brady v. Maryland, 373 U.S. 82 (1963)	12
Desist v. United States, 394 U.S. 244 (1969)	8
Earl v. United States, 361 F.2d 531 (D.C. Cir., 1966)	12
Giordano v. United States, No. 28, October Term, 1968, 37 U.S.L.W. 3353	8
Jencks v. United States, 353 U.S. 657 (1957)	11
Kaiser v. New York, 394 U.S. 280 (1969)	8
Katz v. United States, 389 U.S. 347 (1967)	2, 8, 9
Lopez v. United States, 373 U.S. 427 (1963)	9
Massiah v. United States, 377 U.S. 201 (1964)	10
Olmstead v. United States, 277 U.S. 438 (1932)	10
On Lee v. United States, 343 U.S. 747 (1952)	9
Preston v. United States, 376 U.S. 364 (1964)	8
White v. United States, 405 F.2d 838 (7 Cir., En Banc 1969), cert. granted 89 S.Ct. 1305 (1969)	8, 9

Constitutional Amendments:

Fourth Amendment to the Constitution of the United States 3

Fifth Amendment to the Constitution of the United States 3

Sixth Amendment to the Constitution of the United States 4

Statutes:

Md. Ann. Code, Art. 27 § 125 A-D (1967 Replacement Volume) 4, 9

Md. Ann. Code, Art. 27 § 585 (1967 Replacement Volume) 4, 9

Md. Ann. Code, Art. 35 §§ 92-99 (1965 Replacement Volume) 9

Miscellaneous:

Right of the Criminal Defendant to the Compelled Testimony of Witnesses, (Note) 67 Col. L.R. 953 (1967) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

THOMAS J. DONOHUE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Thomas J. Donohue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on May 6, 1969.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, printed in Appendix A hereto, infra, p. 1a, is reported in ___U.S.App.D.C.___, ___F.2d ___. The amendment to the opinion is printed herein in Appendix B, infra, p. 10a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 6, 1969, R. 2, Appendix C, infra, p. 12a. A timely filed petition for rehearing was denied July 2, 1969. On August 1, 1969, Mr. Chief Justice Warren E. Burger signed an order extending the time within which to petition for a writ of certiorari to and including August 30, 1969. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the Government's warrantless search and seizure of words uttered by defendant, without his consent, admissible as evidence in a federal criminal trial where obtained by electronic eavesdropping prior to this Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), by trespass of defendant's automobile, "a constitutionally protected area," through the use of a non-testifying informer, secretly rigged by the Government with a radio transmitting device.

2. Is the Government under this Court's supervisory powers prohibited from using as evidence in a federal criminal trial, oral conversations of a non-consenting defendant, obtained by the Government's warrantless search and seizure by means of electronic eavesdropping in direct violation of a state statute requiring them to obtain a warrant before a judicial officer.

3. Was defendant's right to counsel guaranteed by the Sixth Amendment to the Constitution of the United States violated by the Government's use of evidence in a federal criminal trial of alleged admissions of defendant obtained by it in a warrantless electronic eavesdropping after the investigation had otherwise been completed and had clearly focused on defendant, but prior to his arrest or indictment, particularly where prior to the search and seizure of defendant's words, the Government, acting through the same official who subsequently supervised the electronic eavesdropping, had advised and was fully cognizant that defendant was rep-

resented by counsel and had told defendant that if he did not confess he would be indicted.

4. Is the Government permitted to make a judicially approved pre-trial agreement not to use as evidence recorded electronic eavesdropped conversations of defendant except upon reasonable notice, in consideration of not being required to produce the same for inspection under discovery rules, and then use and give notice of intent to use the same immediately after the defendant has testified in his own behalf of direct examination, for the purpose of cross-examination of the defendant.

5. Does the due process clause of the Fifth Amendment to the Constitution of the United States require a Federal District Court and/or the Government to grant limited immunity to a prospective defense in order to secure his testimony, when the Government's chief witness has been granted immunity, and where the Court has ascertained that the witness' testimony will directly contradict that of the Government's chief witness, and where the defense witness refuses to testify on grounds of possible self-incrimination.

CONSTITUTIONAL AMENDMENTS

The Fourth Amendment to the Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States

> No person shall . . .; nor shall be compelled in any Criminal Case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the Constitution of the United States

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Art. 27 § 125 A-D, and § 585 of the Maryland Annotated Code (1967 Replacement Volume) are printed herein, as Appendix D, infra, p. 13a.

STATEMENT

In a multi-count indictment returned April 22, 1966, defendant, an officer of the Metropolitan Police Department of Washington, D.C. was charged together with four other police officers with conspiring to violate the District of Columbia bribery statute, 18 U.S.C. § 371, 22 D.C. Code § 704 (1967).[1] Nine months later, an eight-week trial resulted in defendant's acquittal of bribery charges but conviction of conspiracy, upon which a sentence of imprisonment of sixteen (16) months to four (4) years was imposed.[2]

The Government's evidence largely furnished by its chief witness, Robert Earl Barnes, a professional housebreaker, alleged the formation of a conspiracy between Barnes and two police officers (not Donohue) in January, 1964 for the purpose of permitting Barnes to evade the law or escape successful prosecution. Donohue, a detective, at one time assigned to a precinct where the other two officers were also

---

[1] Donohue was charged with one count of conspiracy and one count of bribery.

[2] Three of the five defendants were convicted of conspiracy. Of these three, two were convicted of bribery. Two defendants were acquitted of both conspiracy and bribery. The two officers allegedly present when Robert Earl Barnes claimed the conspiracy was formed were convicted of both offenses.

assigned, was alleged to have joined the conspiracy in July, 1964.[3]

In the late summer of 1965, while languishing in jail, Robert Earl Barnes decided to improve his position in life. After conferring with the United States Attorney for the District of Columbia, an agreement was reached whereby in exchange for immunity, except as to indictments then pending against him, Barnes would testify to and reveal all the crimes which he had committed in this area (Tr. Vol. 4 p. 623, 627-628; Vol. 6, p. 863a; Vol. 15, p. 2237-2242). Barnes testified before the Grand Jury with respect to this case, on November 15, 1965 (Tr. Vol. 5, pp. 789-790), at approximately the same time that defendant was interrogated by the Metropolitan Police Department concerning the charges specifically levied by Barnes.

In December 1965, an Assistant United States Attorney in charge of the investigation and subsequently Government trial counsel, advised Donohue that he wanted to talk to him, suggesting that he bring with him either an attorney or a friend (Tr. Vol. 26, p. 3656 *et. seq.*). The conference took place, with Donohue represented by counsel, in December 1965, at which time the Government told him to confess or he would be indicted (Tr. Vol. 26, p. 3658).

---

[3]Robert Earl Barnes testified as to a very large number of housebreakings perpetrated by him and how the five defendants allegedly helped him to evade the law or prosecution.

Defendant Donohue was alleged to have been involved in only three events. The principal event wherein Barnes alleged that Donohue helped to get the prosecution "nollied," was the subject matter of the substantive count of bribery of which Donohue was acquitted. The evidence, largely documentary, overwhelmingly disproved Barnes' contentions. A second event involved Barnes' claim that Donohue promised to drive the two-man-operated cruiser in the vicinity of a planned housebreaking. His claim was refuted by the other officer in the cruiser. The third event involved a police raid on an establishment operated by Barnes who contended that during the raid he gave Donohue a gun. This was refuted by one of the officers who participated in the raid. The defendant denied all wrongdoing.

In January 1966, James T. Skeens, a confederate of Barnes was approached by the same Assistant United States Attorney and agreed to become an informer for the Government (Tr. Vol. 25, p. 3456).[4] Obtaining an immediate release from jail, Skeens made contact with Donohue. Skeens, secretly rigged with a radio transmitting device, met Donohue on two occasions in the latter's automobile. The conversations were overheard and recorded by participating members of the Metropolitan Police Department located approximately a mile away. On both of these occasions the entire proceedings were located within the State of Maryland. Skeens, Donohue and the participating police officers were all residents of the State of Maryland.[5]

Following return of the indictment discovery motions calling for the production of tape recordings of these overheard conversations were sought. Motions were denied on the basis that revelation of the tape recordings would reveal the informer and his life might be in danger (this was the Government's allegation; there was no suggestion that the informer's life was endangered by Donohue).

In December 1966 a pre-trial conference was held by the Court, which was not stenographically reported. All parties agree that the Government stated it would not use the electronically eavesdropped recordings, except upon first giving reasonable notice. In return, the Government was not required to divulge either the tape recordings or the name of the informer.

Only after Donohue had completed his case to the point of having testified himself on direct examination, did the

---

[4]At that time Skeens was incarcerated, his bail having been revoked by the Court while he was awaiting the outcome of an appeal from a misdemeanor conviction. He was represented by counsel who was never contacted by the Government. On or about February 4 1966 on the basis of Skeens' hand-written motion to be admitted to bail, the Government appeared before the Court, ex parte and obtained his release.

[5]See Tr. Vols. 23, 24, 25, and 26.

Government advise that it intended to use the tape recordings. Overruling all objections, the trial Court permitted the Government to use the tape recordings in the cross-examination of Donohue. The tape recordings evidenced that Donohue had knowledge of the existence of the conspiracy. Donohue advised that as a detective, knowing that he himself was about to be indicted, he contacted Skeens in the hope of ascertaining answers to questions which might help him.

During trial, Barnes testified as to the commission of a robbery at the home of Stanley Sonneborn, indicating that it was faked and planned by Sonneborn to avoid a payoff to gamblers (Tr. Vols. 2, 3, pp. 250-255, 419 *et seq.*; Tr. Vol. 7, pp. 1007, 1026-1073). This information was not provided by Barnes to the Government until eight months after he testified before the Grand Jury (Tr. Vol. 3, pp. 419 *et seq.*). The incident implicated only Officers Denham and Wallace. Sonneborn was subpoenaed as a witness for the defense and testified out of the presence of the jury (Tr. Vol. 29, pp. 4124-4150). He denied knowing Denham (Tr. Vol. 29. p. 4143). Sonneborn said that he wanted to tell the truth about the robbery, but being on probation did not want to be indicted for past gambling activities or become involved with the Internal Revenue Service. He therefore claimed his privilege against self-incrimination which was upheld by the Court. Although requested, both the Court and the Government refused to grant Sonneborn any form of limited immunity which would permit him to testify as to the facts in issue. A motion to strike the testimony of Robert Earl Barnes was denied.

While the matter of Sonneborn was under consideration by the Court, the Government advised that it had just learned from James T. Skeens that the Sonneborn robbery was real, not faked (Tr. Vol. 29, p. 4147; Vol. 30, pp. 4237, 4238).

REASONS FOR GRANTING THE WRIT

I

ELECTRONIC EAVES DROPPING PRIOR TO *KATZ* v. *UNITED STATES*, 389 U.S. 347 (1967).

The Circuit Court of Appeals held that it would be an extension of *Katz, supra,* to bar electronically eavesdropped and recorded evidence, obtained without a warrant, where one party consents to the surveillance. Appendix A, p. 4a. The Court further construed *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030 (1969) as holding that the exclusionary rule of *Katz* would not be applied to any electronic eavesdropping prior to the date of that decision. Appendix A, pp. 4a, 5a.

The Circuit Court of Appeals clearly misconstrued both *Katz* and *Desist.* As this Court in *Kaiser v. New York,* 394 U.S. 280, 89 S.Ct. 1044 (1969) pointed out, at pp. 282 and 1046, it was not until *Katz* that the Court overruled its prior decisions that the Fourth Amendment encompassed seizures of speech only if the law enforcement officials committed a trespass or at least physically invaded a constitutionally protected area of the speaker.

Sixteen cases were remanded by this Court on the dav of the *Desist* ruling for further proceedings in the District Court to determine whether the electronic eavesdropping was the result of a trespass of a constitutionally protected area or was otherwise illegal. *Giordano v. United States,* No. 28, 37 U.S.L.W. 3353.

In the instant case, the Circuit Court of Appeals refuses to consider whether there was a trespass of a constitutionally protected area, even though the electronic eavesdropping occurred in defendant's automobile. *Preston v. United States,* 376 U.S. 364, 366 (1964).

At issue is whether the invasion of a constitutionally protected area by a secretly rigged transmitting informer constitutes a trespass in the Fourth Amendment constitutional sense. The situation is identical with *White v. United States,* 405 F.2d 838 (7 Cir., en banc, 1969) wherein this

Court has granted certiorari, No. 1024, ___ U.S. ___, 89 S.Ct. 1305. In *White*, the Court en banc held to the contrary of the Circuit Court of Appeals for the District of Columbia Circuit, although *Desist* had not been decided.

On Lee v. United States, 343 U.S. 747 (1952) involving an electronic trespass of a business place and an outside sidewalk furnishes the only support for the Government's position that no trespass occurred in the instant case. But it must be determined whether *On Lee* had any validity immediately prior to *Katz*. See concurring and dissenting opinions in *Lopez v. United States*, 373 U.S. 427 (1963). Like in *On Lee*, Skeens did not testify, but relied on his privilege of self-incrimination.

Although Donohue in talking to Skeens took the risk that Skeens would testify against him, he neither invited into his constitutionally protected area nor took the risk that an uninvited ear, to wit, a radio transmittal device was also present.

In view of the fact that the doctrine of a constitutionally protected area has not been discarded by *Katz, supra*, the question of what constitutes a trespass, as well as the extent and reach of *Katz*, upon which the Circuit Courts do not agree, are matters which this Court should resolve. There are a number of cases now pending in the Federal Courts which involve these problems.

II

CLAIM UNDER MARYLAND LAW

Concededly Maryland law proscribes electronic surveillance without prior judicial approval, even if one party consents. Md. Ann. Code, Art. 27, § 125 A-D (1967 Replacement Volume). The statute contains no exception for the Federal Bureau of Investigation or any other federal investigatory agency, as does the Maryland wiretap statute, Md. Ann. Code, Art. 35, §§ 92-99 (1965 Replacement Volume) and Art. 27, § 585 (1967 Replacement Volume).

In avoiding the issue of whether evidence obtained in violation of state law is admissible in a federal court, the Circuit Court of Appeals, without any legislative history or Maryland court decisions, adopted a most strained interpretation of Art. 27, § 125C (See Appendix D, infra).

Olmstead v. United States, 277 U.S. 438 (1932) has now been overruled in *Katz v. United States, supra.* The silver platter doctrine has long vanished. In the instant case we are squarely faced with the issue of whether evidence obtained in violation of state law is admissible in a federal criminal trial. The interpretation of the Maryland statute by the Circuit Court of Appeals is unsupportable.

III

THE SIXTH AMENDMENT AND *MASSIAH* v. *UNITED STATES*, 377 U.S. 201 (1964)

The use of an informant, secretly rigged with a transmitting device, to overhear the conversations of a defendant under indictment, constitutionally violates the Sixth Amendment and precludes the use of information so obtained. *Massiah v. United States, supra.* In the instant case the purpose of the Government was the same as in *Massiah*, to obtain damaging admissions. In both cases the Government was aware that the defendant was represented by counsel. The only difference is the mere fact of the indictment. For Donohue the most critical stage of the criminal proceedings may well have been immediately after he was advised that he was going to be indicted. The Circuit Court of Appeals would not permit the prosecutor to talk to the prospective defendant alone, but it permits the prosecutor to secretly elicit the same admissions by electronic eavesdropping, although fully cognizant that Donohue was represented by counsel.

It is respectfully submitted that the administration of criminal justice requires a delineation of when the right of counsel attaches.

IV

DEFENDANT'S RIGHT TO BE A WITNESS IN HIS OWN BEHALF

Operating under a pre-trial agreement, judicially approved, the defendant took the witness stand in his own behalf. With the commencement of cross-examination, the trial Court permitted the Government to breach its agreement. Thus the defendant was placed on the horns of a dilemma and unable to extricate himself. Had he known in advance of the Government's intentions, or had his discovery motions for the production of the tape recorded conversations been granted, defendant would have had an opportunity to make an intelligent decision with respect to the exercise of his constitutional right to be or not to be a witness in his own defense.

This case presents an opportunity to examine fully the constitutional rights of a defendant to be or not to be a witness in his own defense, and to what extent, if any, those rights can be abridged.

V

THE DUE PROCESS CLAUSE AND IMMUNITY

It is factually agreed that the Government's chief witness received a degree of immunity. A defense witness would have testified in direct contradiction but invoked the plea of self-incrimination in order to protect himself as to past activities unrelated to the case being tried. The Court and the Government having failed to grant a degree of immunity to the defense witness, the jury was unable to hear all sides of the story. It would seem that all reasonable people would consider it unfair to give the Government this advantage in a criminal trial, permitting them to utilize immunity to the disadvantage of the defendant.

Although Donohue was not specifically involved in the Sonneborn event, the truth of the event affected the credibility of the Government's chief witness. Such testimony is material to all defendants. *Jencks v. United States,* 353 U.S. 657 (1957).

At stake is not only the question of due process but the duty of the prosecutor to make favorable evidence available to the defense. *Brady v. Maryland*, 373 U.S. 82 (1963), *Earl v. United States*, 361 F.2d 531 (D.C. Cir., 1966), at footnote 1; *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Col. L.R. 953 (1967).

This question, in all its ramifications, has not heretofore been considered by this Court. As the *Earl* case, *supra*, indicates, there is great division in the federal judiciary on the point. The instant case, factually presents an excellent opportunity for consideration of these issues. It is to be noted that the use of immunity by the Government in the last ten years has decidedly been on the increase.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER E. GILLCRIST
1317 F Street, N.W.
Washington, D.C. 20004
Counsel for Petitioner

September 1969

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,134

LAWRENCE F. WALLACE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,135

THOMAS J. DONOHUE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,136

BENJAMIN H. BOWIE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the United States District Court
for the District of Columbia

Decided May 6, 1969

Mr. Ira M. Lowe for appellant in No. 21,134.

Mr. Walter E. Gillcrist for appellant in No. 21,135.

Mr. H. Clifford Allder for appellant in No. 21,136.

Mr. William M. Cohen, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney, *Frank Q. Nebeker* and *Harold J. Sullivan*, Assistant United

States Attorneys, were on the brief, for appellee. *Mr. Thomas Lumbard*, Assistant United States Attorney, also entered an appearance for appellee in Nos. 21,135 and 21,136.

Before McGOWAN, TAMM and LEVENTHAL, *Circuit Judges*.

PER CURIAM: In November, 1965, Robert Earl Barnes, a professional burglar, now serving a substantial sentence in a federal penitentiary, testified before a grand jury that several members of the District of Columbia Metropolitan Police Department had accepted bribes in return for protecting him from arrest and prosecution for plying his trade. Following the return of indictments on April 22, 1966, and an eight-week trial beginning January 5, 1967, appellant police officers were convicted of conspiracy to violate the District of Columbia bribery statute. 18 U.S.C. § 371 (1964); 22 D.C. Code § 704 (1967).[1] Of the numerous trial errors asserted by appellants, only the admissibility of recorded evidence obtained through the use of an informer presents issues meriting extended discussion. Having reserved decision on one of these issues pending its resolution by the Supreme Court, we now conclude that the recordings were lawfully obtained and were admissible in evidence, and that none of the other alleged errors denied appellants a fair trial. Accordingly, we affirm their convictions.

I

The Government monitored and recorded certain face-to-face and telephone conversations between appellants Wallace and Donohue and their acquaintance James Skeens, a sometime gambler who was a party to the Government surveillance. Most of the conversations recorded took place in February, 1966; two occurred early in April of that year.

---

[1] Appellants Wallace and Bowie were also convicted of accepting individual bribes, although Bowie was acquitted on one substantive bribery count. Appellant Donohue was acquitted of bribery. Two other police officers were acquitted of all charges, including a conspiracy count.

The Government before trial informed appellants' counsel of the existence of these recordings but obtained a protective order from the trial judge denying appellants discovery of the recordings because Skeens believed that disclosure of his identity as an informer would imperil the lives of his family and himself. The prosecutor stipulated at an unrecorded pre-trial conference that he did not then intend to use the recordings, and that he would give defense counsel reasonable notice if he later decided to offer them as evidence at the trial. Midway through the trial, after appellant Wallace had completed his testimony on direct and cross, and at the end of the direct examination of appellant Donohue, Skeens changed his mind and agreed to testify for the Government, with the understanding that the Government would provide armed marshals to protect his family. The trial court ruled, over the objections of all three appellants, that Skeens would be permitted to testify in rebuttal and that the recordings could be used as corroboration.

It later developed, however, that due to an inconclusive exchange between counsel and the trial judge with respect to the consequences of Skeens' waiving his attorney-client privilege *vis-a-vis* his former counsel, who also was trial counsel for appellant Donohue, Skeens did not take the stand, with the tacit acquiescence of all counsel at the trial. Transcripts of the recorded conversations were used to cross-examine Donohue, who admitted participating in the conversations and attempted to explain certain incriminating statements in them by alleging that they were part of the stock-in-trade of an undercover agent. The Government later called the monitoring officer to testify to statements made by Wallace tending to rebut his testimony. It also introduced portions of the transcripts in evidence in connection with the officer's rebuttal testimony. Finally, counsel for Wallace introduced parts of the recordings which tended to exculpate Wallace.

Appellants Wallace and Donohue[2] urge that the recordings were inadmissible because they were seized in violation of the Fourth Amendment and the law of the State of Maryland where most of the surveillance took place. Appellants further claim that obtaining recorded admissions through an informer after Barnes had implicated them before the grand jury violated their Sixth Amendment right to counsel. Finally, they allege that the decision to use the recordings after some of them had testified at the trial could not possibly afford them the reasonable notice promised in the pre-trial agreement.

A. Fourth Amendment Claim

Appellants argue that the Supreme Court's ruling in *Katz v. United States*, 389 U.S. 347 (1967), should be extended to bar the use at trial of recorded evidence obtained without a warrant, even though one party to the recorded conversation consented to the surveillance. Courts have divided on this question,[3] but, whatever the reach of the *Katz* decision, it cannot aid these appellants. The Supreme Court has now held that the exclusionary rule adopted in *Katz* shall not be applied to evidence obtained through electronic surveillance

---

[2]Appellant Bowie also claims error in the use of the recordings, but lacks standing to challenge the manner in which they were obtained. Alderman v. United States, 37 U.S.L.W. 4189, 4191-92 (U.S. March 10, 1969).

[3]Cases holding that the *Katz* decision applies to so-called consensual surveillance are Doty v. United States, Nos. 9031-38 (10th Cir., June 4, 1968), *petition for rehearing en banc granted sub nom.*, Epps v. United States, No. 9032 (10th Cir., July 29, 1968); United States v. White, ___ F.2d ___ (7th Cir., Jan. 7, 1969) (*en banc*), *cert. granted*, 37 U.S.L.W. 3379 (U.S. April 7, 1969); United States v. Jones, 292 F.Supp. 1001 (D.D.C. 1968), *appeal docketed*, No. 22,529 (D.C. Cir. Nov. 29, 1968); *but see* Holt v. United States, 404 F.2d 914 (10th Cir. 1968). Cases holding to the contrary are Dancy v. United States, 390 F.2d 370 (5th Cir. 1968) (electronic monitoring); Dryden v. United States, 391 F.2d 214 (5th Cir. 1968) (telephonic communication); Kaufer v. United States, ___ F.2d ___ (2d Cir. 1968), *aff'd*, 37 U.S.L.W. 3365 (U.S. April 1, 1969) (citing Desist v. United States, 37 U.S.L.W. 4225 (U.S. March 24, 1969)).

conducted before December 18, 1967, the date of the *Katz* decision, and the conversations involved here took place nearly two years before that date. *Desist v. United States*, 37 U.S.L.W. 4225 (U.S. March 24, 1969), *and see Kaufer v. United States*, 37 U.S.L.W. 3365 (U.S. April 1, 1969).

B. Claim Under Maryland Law

Maryland law prosc[illegible]bes electronic surveillance and wiretapping without prior judicial approval even if one party to the conversation consents. Md. Ann. Code, Art. 27, §§ 125 A-D (1967 Replacement Volume); Art. 35, §§ 92-99 (1965 Replacement Volume). The Government maintains that these prohibitions do not apply to the surveillance in this case, though most of it occurred in Maryland, for two reasons: (1) the Maryland statutes contain exceptions for surveillance conducted by the Federal Bureau of Investigation or by "any other federal investigating agency;" Md. Ann. Code, Art. 27, §§ 125c, 585 (1967 Replacement Volume); Art. 35, § 98 (1965 Replacement Volume), and (2) the evidence is admissible in federal court even if it was obtained in violation of state law.

We believe that the surveillance in this case was undertaken by a federal investigating agency within the meaning of the statutory exception. The violations of law investigated and prosecuted arose under the federal conspiracy and District of Columbia bribery statutes, both offenses against the United States which are prosecuted in its name. Moreover, the investigation, carried on by Metropolitan Police officers, was conducted under the direct supervision of the office of the United States Attorney. Accordingly, in the absence of a contrary interpretation of the Maryland statute by its own courts, we hold that, for the purposes of this case, the surveillance was conducted by a "federal investigating agency." Because we agree that the surveillance was not forbidden by the Maryland statute under these conditions, we do not reach the question of whether federal courts may freely admit evidence obtained in violation of state law. *Cf. United States v. Pardo-Bolland*, 348 F.2d 316, 323 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965).

C. Sixth Amendment Claim

Appellants Wallace and Donohue argue that their statements to Skeens were inadmissible, despite the fact that they had not been arrested, indicted, or otherwise formally charged, because they were obtained without counsel present after the investigation had "focused" upon them. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *compare Massiah v. United States*, 377 U.S. 201 (1964). Barnes testified concerning appellants' illegal activity before the grand jury in November, 1965. The monitored conversations used at trial took place in February, 1966; appellants were indicted in April, 1966.

Appellant Donohue stresses the fact that in early December, 1965, the prosecutor invited him to discuss some allegations made against him, but said he would not do so unless Donohue brought with him an attorney or a friend. Donohue engaged counsel who was present at two meetings with the prosecutor, at which the prosecutor sought to obtain a confession from Donohue and his cooperation as a witness.

The Sixth Amendment does not forbid the securing of admissions by undercover tactics from a suspect prior to arrest or indictment. No danger of coercion compels police officers and courts to pick a peril-point in an investigation at which the right to counsel attaches to bar further undercover investigation. Law enforcement officers need not, and as a practical matter cannot, be required to halt a criminal investigation when "they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). The right to counsel has been extended to phases of an investigation prior to arrest or formal charge only when the suspect was in custodial circumstances. *Mathis v. United States*, 391 U.S. 1 (1968); *Miranda v. Arizona*, 384 U.S. 436, 444 n.4 (1966). While it was entirely proper for the prosecutor to advise appellant

Donohue to bring counsel to their conferences, the Sixth Amendment did not compel him to elect between efforts to secure Donohue's cooperation, so long as counsel was present when those efforts were made, and further undercover investigation to obtain admissions if those efforts did not succeed.

D. Reasonable Notice Under the Pre-trial Agreement

Appellants claim that the trial court abused its discretion in allowing the use of the Skeens' evidence after appellants Wallace and Donohue had testified in the expectation that it would not be available. The trial court recognized that "reasonable notice" under the agreement was not simply a question of allowing time for defense counsel to digest the transcripts, but one of fairness in admitting the evidence after appellants had taken the stand and committed themselves. The trial judge after inquiry accepted the Government's representations that Skeens had been unavailable up to the time that he changed his mind about testifying, and concluded that the public should not be penalized for the prosecutor's inability to persuade Skeens to testify earlier in its case-in-chief. Without overlooking the importance of appellants' right to discovery and notice, he allowed the testimony in the belief that it was probative, and rejected the argument that appellants were entitled under all circumstances to count on Skeens' continuing unavailability in taking the stand. We think his decision to permit the use of the testimony was well within his discretion, particularly since he limited its use, and incidentally its effectiveness, to the rebuttal of matters raised earlier in the trial.

II

Of the other issues raised by the appellants, none is meritorious and few require mentioning, much less serious discussion. What follows is a brief review of the more weighty points made by appellants. Appellants Donohue and Bowie moved for a mistrial, and Wallace claimed that he was entitled to severance, when it came out at trial that two

witnesses were afraid to testify.[4] These motions were denied after the trial judge admonished the jury not to be influenced by any improper considerations. We find no error in these rulings.

Another alleged error involved a newspaper column detailing threats to jurors and to the prosecutor in charge of the case. After this came to the attention of the judge, he interviewed the jurors separately in chambers in a procedure agreed to by all counsel. The court obtained satisfactory assurances that the jurors could render a verdict not prejudiced by the publicity. *Cf. United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied sub nom., Guippone v. United States*, 372 U.S. 959 (1963). The responses of the jurors on voir dire indicated their commendable efforts to avoid reading comment on the trial. And special verdicts, including acquittal of two defendants on all counts and of two of the appellants on some counts, serve to confirm the court's finding that the jury would be able to render an impartial verdict.

A trial involving charges of police corruption, lasting many weeks, most probably cannot be quarantined even with the best efforts of all concerned. However, the prosecution does bear a special responsibility to avoid tactics that needlessly add spice to the atmosphere which inevitably

---

[4]One witness refused to identify appellants Bowie and Donohue when asked to do so by the prosecutor. He did not claim surprise, but learned from her later that she thought a man in a white car had been watching her house. The prosecutor reassured her, and the judge allowed her to be recalled to make the identification. It was later brought out at the trial that a policeman in a white car had been searching the area for a witness in an unrelated case.

In the second incident, another witness replied to an ill-advised question put by counsel for Wallace that Wallace and Bowie had threatened him, but subsequently explained that neither defendant had threatened him directly. What prejudice remained after this clarification was largely created by defense counsel, and properly prompted the trial court to caution defense counsel against deliberately playing for a mistrial.

will hang over such trials. We are not impressed by the prosecutor's questioning appellants about connections with criminal characters where the inquiries were never tied up with the incidents charged at trial, nor by what we consider to be a trial needlessly prolonged by a lengthy cataloguing of incidents involving the protagonist, Barnes, which often did not even involve any of the appellants. The prosecutor may have thought that appellants' general acquaintance with the criminal element in the District would help to establish the conspiracy, a doubtful proposition for a group of detectives who can be expected to know who's who in the underworld. In any event, the cumulative potential for prejudice in open-ended questioning outweighed the materiality of the disclosure that appellants were acquainted with a number of local criminals. When it became apparent that these questions were leading nowhere, the trial court cut them short, in time, we think, to prevent undue prejudice to appellants. There may be cases, however, where the court cannot judge the materiality of references to underworld associations until the damage has been done, and thus we emphasize the prosecutor's duty of restraint.

Appellants also challenge the sufficiency of the evidence to show knowledge of a conspiracy, claim that they were denied discovery of significant evidence, and assert that they were denied a full cross-examination of Barnes. We find that there was adequate evidence to show mutual knowledge of a common criminal enterprise. No evidence of importance to the defense was withheld, and Barnes was cross-examined for four days, on all but three plainly minor and collateral matters. We thus conclude that none of the alleged errors, individually or cumulatively, tainted appellants' trial, and affirm their convictions.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed June 24, 1969]
[Nathan J. Paulson, Clerk]

No. 21,134-5-6 September Term, 1968

Criminal No. 486-66

Lawrence F. Wallace,
Thomas J. Donohue,
Benjamin H. Bowie,
Appellants,

v.

United States of America,
Appellee.

ORDER

It is ORDERED by the Court, *sua sponte*, that the opinion filed herein on May 6, 1969 be amended as follows:

1. Add "3a" at the end of the paragraph on page 7 headed *D. Reasonable Notice Under the Pre-Trial Agreement.*

2. At the bottom of page 7 add the following footnote:

> [3a]Appellants Wallace and Bowie also argue that the recordings of Donohue's conversations, which were obtained after the informer Barnes had implicated the appellants before the grand jury and the conspiracy was over, contained statements which referred to them in such a way that their impact could not be erased by means of instructions to the jury limiting their application to Donohue, the person who made the statements. *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton*, however, is distinguishable. Based as it was on the right to confrontation contained in the Sixth Amendment, see *Harrington v. California*, ___ U.S. ___ (1969), it

should not be extended to cover a situation in which the witness involved actually did take the stand and did affirm the fact that he had made the statements attributed to him. Counsel for Wallace and Bowie thus had every opportunity to cross-examine Donohue, although their best tactic probably was to accept Donohue's explanations of his statements at face value.

3. Change the second paragraph of footnote 4 on page 8 to read as follows:

In the second incident, another witness replied to an ill-advised question put by counsel for Wallace that Wallace and Donohue had threatened him, but subsequently explained that neither defendant had threatened him directly. Such prejudice as remained after this clarification does not appear to have been so substantial as to warrant our holding that the trial court abused its discretion in denying Donohue a mistrial.

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 2, 1969]
[Nathan J. Paulson, Clerk]

No. 21,134 — September Term, 1968
Lawrence F. Wallace, — Criminal No. 486-66
Appellant,

v.

United States of America,
Appellee.

No. 21,135
Thomas J. Donohue,
Appellant,

v.

United States of America,
Appellee.

No. 21,136
Benjamin H. Bowie,
Appellant,

v.

United States of America,
Appellee.

Before: McGowan, Tamm and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' petitions for rehearing, it is ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam.

APPENDIX D

Art. 27, § 125 ANNOTATED CODE OF MARYLAND

ELECTRONIC DEVICES

§ 125A. Use to overhear or record private conversation.

(a) *Use without knowledge or consent prohibited.*—It is unlawful for any person in this State to use any electronic device or other device or equipment of any type whatsoever in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person.

(b) *Prevention of crime or apprehension of criminal—Petition for ex parte order authorizing use.*—However, if it shall appear to a duly authorized public law enforcement officer of this State that a crime has been, or is being, or is about to be committed, and that the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it, then the law enforcement officer or officers shall submit to the State's attorney of the county or of Baltimore City the evidence upon which the said law enforcement officer bases his contention that an ex parte order authorizing the use of the said electronic devices is necessary; and if it shall appear to the said State's attorney that there are reasonable grounds to believe that a crime has been committed or is being committed or may be committed then the said State's attorney shall apply to any of the judges of the circuit court of the county or of the Supreme Bench of Baltimore City, by means of a formal ex parte petition for the issuance of an order authorizing the use of the said electronic devices or equipment, and shall make oath or affirm in the said petition that there is probable cause to believe that a crime may be, or is being, or has been committed and shall state the facts upon which said probable cause is based, and further, that the use of the said electronic devices or equipment is necessary in order to prevent the commission of, or to secure evidence of the commission of such crime. In such case the affiant shall identify, with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have been, or about to be committed, and that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued. The applicant must state whether any prior application has been made in the same matter and if such prior application exists the applicant shall disclose the present status thereof.

(c) *Same—Issuance of order; duration; disposition.*—The judge of the circuit court of the county or of the Supreme Bench of Baltimore City shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order. Such ex parte order shall be effective for the time specified in the order, but for not more than thirty days unless extended or renewed by the judge, upon proper petition meeting the same requirements as the original petition. Any ex parte order so issued shall be retained by the applicant as authority for the use of the electronic device or equipment therein set out and the interception of the conversation sought to be intercepted. A true copy of such order, together with any exhibits submitted with the petition shall be sealed and filed with the clerk of the court in which the order is issued, at the time of its issuance, provided, however, that such order shall be available to persons in interest after arrest, upon order of the court. (1959, ch. 706.)

§ 125B. Same—Penalty; employee of telephone or telegraph company.

Any person or persons who shall use any electronic device or equipment or other devices or equipment or other devices or equipment of any type whatsoever, in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation, without their knowledge or consent, either expressed or implied, except in compliance with the terms of this subtitle, shall be deemed guilty of a misdemeanor, subject, upon conviction, to a fine not exceeding five hundred dollars ($500), or to imprisonment for not exceeding one (1) year, or to both such fine and imprisonment, in the discretion of the court. Nothing herein contained shall be construed or implied to affect any employee of a telephone company or a telegraph company, as those terms are defined in Article 78 of the Annotated Code of Maryland, while in the regular course of his employment by such company, and engaged in company business. (1959, ch. 706.)

Editor's note. This section is set out above exactly as it appears in the 1959 printed acts.

§ 125C. Conflict with provisions as to wiretapping.

Nothing in this subtitle shall be construed or given effect to prevail over the wiretapping provisions in § 585 of this article and in §§ 92 to 99, inclusive, of Article 35 of this Code. (1959, ch. 706.)